

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 21, 2020

SECRETARY OF LABOR  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
Petitioner,

v.

CONSOL PENNSYLVANIA COAL CO.,  
LLC,  
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. PENN 2019-0100  
A.C. No. 36-07230-490127

Mine: Bailey Mine

## **AMENDED DECISION AND ORDER**<sup>1</sup>

Appearances: John M. Strawn, Esq., & Kenneth J. Polka, CLR, Office of the Solicitor,  
U.S. Department of Labor, Philadelphia, Pennsylvania, for the Secretary  
of Labor

Patrick W. Dennison, Esq., Fisher & Phillips, LLP, Pittsburgh,  
Pennsylvania, for the Respondent

Before: Judge Lewis

### **STATEMENT OF THE CASE**

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the “Act” or “Mine Act”). A hearing was held in Pittsburgh, Pennsylvania. The parties subsequently submitted briefs which have been fully considered in reaching the within decision.

### **LAW AND REGULATIONS**

Section 314 (b) of the Act and Section 75.1403 of the Regulations provide:

Other safeguards adequate, in the judgment of an authorized representative of the Secretary to minimize hazards with respect to transportation of men and materials shall be provided.

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<sup>1</sup> This order has been amended to include the technical citation numbers associated with the safeguards at issue herein.

Section 75.1434 **Retirement Criteria** provides:

Unless damage or deterioration is removed by cutoff, wire ropes shall be removed from service when any of the following conditions occurs:

- (a) The number of broken wires within a rope lay length, excluding filler wires, exceeds either—
  - (1) Five percent of the total number of wires; or
  - (2) Fifteen percent of the total number of wires within any strand;
- (b) On a regular lay rope, more than one broken wire in the valley between strands in one rope lay length;
- (c) A loss of more than one-third of the original diameter of the outer wires;
- (d) Rope deterioration from corrosion;
- (e) Distortion of the rope structure;
- (f) Heat damage from any source;
- (g) Diameter reduction due to wear that exceeds six percent of the baseline diameter measurement; or
- (h) Loss of more than ten percent of the rope strength as determined by non-destructive testing.

## **FINDINGS OF FACT AND CONCLUSION OF LAW**

The findings of fact are based on the record as a whole and the undersigned's careful observation of the witnesses during their testimony. In resolving any conflicts in the testimony, the undersigned has taken into consideration the interests of the witnesses, or lack thereof, and consistencies, or inconsistencies, in each witness's testimony and between the testimonies of the witnesses. In evaluating the testimony of each witness, the undersigned has also relied on his demeanor. Any failure to provide detail as to each witness's testimony is not to be deemed a failure on the undersigned's part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

## **JOINT STIPULATIONS**

1. The Bailey Mine ("Mine") is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 ("Act").
2. The Mine is owned and operated by Respondent, Consol Pennsylvania Coal Company, LLC.
3. The presiding Administrative Law Judge has jurisdiction over the above-captioned proceedings pursuant to Section 105 of the Act.
4. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein.

5. The subject citations and safeguards were served by a duly-authorized representative of the Secretary upon agents for Respondent on the dates and times and the places stated therein.
6. Respondent demonstrated good faith in abating the alleged conditions after the issuance of the safeguards and citations.
7. The penalties proposed on the Exhibit A attached to the Petition for Assessment for Citation Nos. 9076455 and 9076456 are incorrect. The Petitioner agreed to reduce the gravity of the citations to no likelihood, no lost workdays, non-S&S, and also the negligence to none at a pre-penalty settlement conference. The proposed penalties should have been \$135 for each citation. The mine tonnage, controller tonnage and number of violations represented in the Exhibit A attached to the Petition for Assessment are correct.
8. Payment of the total proposed penalty of \$270 in this matter will not affect Respondent's ability to continue in business.

T. 4-6<sup>2</sup>

## **SUMMARY OF TESTIMONY**

### **WITNESSES**

Joseph A. Vargo

At the time of hearing, Inspector Vargo had worked for MSHA for over 12 years. T. 13. He initially worked as a coal mine inspector and later in 2012 had been working as an electrical specialist. Prior to working for MSHA, Vargo had worked as a coal miner for approximately 30 years.<sup>3</sup> T. 14.

Inspector Vargo had issued a technical citation to Respondent arising from Vargo's issuance of a safeguard (No. 9076448) in connection with unsafe conditions observed at the operator's slope track and hoist on August 13, 2018. T. 15-18; *see also* P-1.

*Inter alia*, Vargo had noted a wear pad on the slope that had been worn down approximately one and three quarters inches. T. 17.

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<sup>2</sup> "T" refers to the hearing transcript. "P" refers to the Secretary's exhibits. "R" refers to Respondent's exhibits. "SB" refers to Secretary's post hearing brief and "RB" refers to Respondent's post hearing brief.

<sup>3</sup> *See* T. 13-15 for detailed description of Vargo's mining experience and specialized certifications.

The purpose of the wear pads was to keep the hoist rope from coming into contact with anything that could cause damage to the rope. T. 19. The slope hoist rope should not come into contact with any abrasive material such as gravel, rock, slate, or coal that would cause it damage. T. 20. Excessive wear of the wire rope could lead to the potential of the rope breaking, sending anyone in the car to the bottom at an excessive rate of speed. T. 21-22.

The regulations require that non-destructive testing of the rope—either through measurements or x-rays—be performed every six months. T. 22. The concern is that, during the six month interval, broken wires or metallic loss might not be detected by visual examination. T. 23.

At hearing, photographs were admitted into evidence, which depicted wear on the slope pads in August 2018, leading to the safeguard in question being issued. T. 23-28; P-5.

There were approximately 100 wear pads on the slope track, which had a 14-degree grade. T. 29, 44. Water could get into the valleys of the steel hoist rope, causing corrosion. T. 29. There were numerous escalation reports indicating the rope was either kinked or damaged. T. 30; *see also* P-9. Photographs of the hoist rope, taken in August 2018, revealed what appeared to be broken wires in the middle of the rope. T. 32; *see also* P-5. Photographs also revealed the rope being in contact with coal, and slate/rock mixture. T. 33; P-5. Materials on the tracks during the hoist lowering or raising could cause brake damage and loss of control. T. 39-40. Someone not riding in a car could be exposed to a slip and fall hazard. T. 41.

On cross-examination, Inspector Vargo agreed that he had no experience working on hoists prior to coming to MSHA. T. 45. He also testified that he had never worked on a hoist slope during his MSHA career. T. 45. His training regarding hoists came from a ½ day training at the mining academy and annual refresher training. T. 46.

Vargo had not issued any safeguards between 2007 and August 2018. T. 27. The safeguards at issue were his first issuances. T. 47.

In order to issue a safeguard there must be an actual hazard with respect to the transportation of men and materials and the hazard must not already be covered by a mandatory safety standard. T. 47-48.

Vargo had found the hazard associated with Safeguard No. 9076448 to involve damage and wear to the slope rope. T. 48. He testified that wear pads were cut through or missing. T. 48. There was contact with steel grating, and trough rollers were not turning. T. 48. There was metallic loss and distortion found in the rope. T. 48.

Vargo found that the hoist rope was compliant with the mandatory standards addressing hoist rope retirement criteria on August 7, 2018. T. 51.

A hoist rope, pursuant to § 75.1434, must be removed from service when the number of broken wires within a rope lay length, excluding filler wires, exceeds 5% of the total number of wires, or 15% of the total number of wires within any string. T. 52. Also pursuant to § 75.1434,

a rope must be retired or reterminated if its diameter reduction exceeds 6% of the initial baseline. T. 53.

Vargo had not issued a citation under § 75.1434 (h) because the standard specified a loss of more than 10% of rope strength and the rope strength loss was not as yet beyond 10%. T. 55.

Vargo testified that a hazard existed, even though the slope rope was still compliant with the standard, because the rope “was right at the borderline.” T. 56. One more trip could have put it over the borderline. T. 56. Everything that the rope was in contact with was abrading the wire, the hoist rope. T. 56.

Although Vargo had recommended that wear pads be replaced, he did not record such in his notes. T. 58.

Wear pads were approximately 24” by 24” by 2” thick. T. 59. In his August 15, 2018 citation, Vargo noted a wear pad worn down to 1 ¾”. T. 59; *see also* P-2. Vargo had not recorded in his notes that he had observed that 50-60 wear pads were worn or missing. T. 60. He had been told of such by a mine foreman. T. 60. Vargo himself had taken no measurements of the pads. T. 61.

Vargo had not inspected the slope on August 7, 2018. He had inspected the slope hoist, the brakeman car, the slope hoist building, and the remote hoist building. T. 61-62.

MSHA had not published any directives as to when wear pads should be replaced. T. 64. A wear pad that was worn down one and three quarter inches would not be serving its function. T. 64. The photographs in Exhibit P-5 depicted the slope rope as it looked when it was not in operation. T. 65.

Vargo agreed that the slope rope would be exposed to rain and snow at times. T. 72. He believed that the two furthest trough rollers inby receive the most stress. T. 73. However, he conducted no further inquiry to determine whether this was so. T. 73. He further had not determined how much, if any, the two static rollers contributed to slope rope deterioration. T. 74.

There was no mention of the slope rope contacting concrete in the safeguard or Vargo’s notes. T. 78.

Exhibit P-8 contained reports of the slope hoist being down for more than 30 minutes. Vargo agreed that the March 9, 2018 report concerning braking system lock-up had nothing to do with rope deterioration. T. 78-79. Another report indicating that the hoist had gone down also was not associated with slope rope issues. T. 79; P-8, 3. Vargo further agreed that a kink in a hoist rope could happen to a new rope. T. 80.

On August 13, 2018, Vargo determined that the entire length of the rope contacted material, rock, coal, slate, gravel, and water. T. 85. Vargo further stated that this was not unusual for a slope rope. T. 86.

As to Safeguard No. 9076449, Vargo had observed mine supplies along the slope. He did not know whether any of the material actually contacted the slope car. T. 87; P-4. He had seen some material in the middle of the track contacting the rope but had not noted such in the safeguard. T. 87. Although he slipped on a roof plate while walking the slope, he had again not noted such in the safeguard. T. 88-89. Vargo agreed that no one regularly walked the slope. T. 89. He further agreed that, provided supplies were against the rib and not contacting the slope car, they would not create a clearance issue or hazard. T. 89-90.

In reference to the summary of safeguards, Vargo agreed that there was no written explanation as to what requirements were called for in order to have “properly maintained” wear pads and rollers under Safeguard No 9076448. T. 91-92; R-18. The “above mentioned material” in the safeguard referred to slate, rock, gravel, mud, coal, and water. T. 92. Vargo again agreed that having supplies pushed against the rib in the slope, which did not contact the slope car would not be a violation of Safeguard No. 9076449. T. 93. Vargo further agreed that an individual walking up the slope belt would have a handrail to hold onto. T. 95.

On redirect Vargo further clarified that mine operators are provided with the full text of safeguards that have been issued and not just the summary of safeguards as contained in R-18. T. 96.

Slope wear pads are not doing their jobs if they don’t keep the hoist rope off the ground and from contact with other materials. T. 97.

At the time of Vargo’s hoist rope inspection in August 2018, Bailey Mine’s next non-destructive test (“NDT”) was scheduled for October 2018. T. 98. Vargo, however, agreed the mine operator changed or reterminated portions of their ropes between the times of the mandatory six month non-destructive tests. T. 99. He additionally agreed that Baily Mine conducted daily visual rope exams that included the hoist rope. T. 99.

### Michael Snyder

At the time of hearing, Michael Snyder had worked for MSHA for 33 years. T. 103.

He described various photographs taken at Bailey Mine on August 17, 2018, contained in Exhibit P-5. T. 104. These included: the hoist rope (P-5, 1 and 2); the rear of the brakeman car to which the hoist rope was attached (P-5, 3); the hoist rope running through debris (P-5, 4); the hoist rope drum (P-5, 5); wear pads covered with debris (P-5, 6); another photo of the rope from a longer perspective, running on top of the cross ties (P-5, 7); another view of the rope cutting through the wear pads into the dirt (P-5, 8). T. 104-108.

The rope was 1 5/8” in diameter and the wear pads about 2” thick. T. 108. A non-destructive examination was taken of the rope at the worst section T. 108. The non-destructive test was “right at ten percent loss of metallic area.” T. 108. Three physical diameter measurements were “right at approximately six percent.” T. 108.

The hoist rope diameter measurements had been taken “at the worst spot” of 1.572, 1.571 and 1.572—1.571 being the smallest diameter reading. T. 110; *see also* P-6. By dividing 1.71 by 1.67, there was found to be a 5.93% diameter reduction.<sup>4</sup> T. 110. Any reduction exceeding 6% met the regulation retirement criteria. T. 110. While the diameter had not yet exceeded the regulation, “it was right at the edge.” T. 110.

There had been a non-destructive test performed on April 21, 2018—about one month after the rope had been installed. T. 111. Given that the next scheduled 6-month examination was set for October 21, 2018, and the inspection at-issue was on August 7, 2018, it would be 6 weeks before the hoist rope would have been examined again. T. 111.

Lubrication allows the hoist rope wires to “move freely around.” T. 111. Exhibit P-5 contained a photograph taken on August 7, 2018 of the spool showing a dry rope. T. 111-112. Areas having lubrication would appear darker. T. 113.

Exhibit P-7 contained the memo sent to the district manager of the Mine Safety and Health Administration Russell Riley by Snyder, detailing the August 7, 2018 non-destructive test findings. T. 114. Based on his observations and testing, Snyder recommended that more frequent non-destructive examinations be conducted—every 4 months rather than 6-month intervals. T. 115.

On cross-examination Snyder agreed that there were no violations or hazards found in respect to the hoist rope on August 7, 2018. T. 119-120.

In determining whether there is diameter reduction exceeding six percent of the baseline diameter measurement, pursuant to § 75.1434 (g), calipers could be used. T. 120-131. The hoist rope strength was “right at the limit” but “compliant” within the limits of § 75.1434 (h). T. 122. The hoist rope also did not meet the broken wires retirement criteria contained in § 75.1434 (a). T. 124. If a non-destructive test reveals more than a 10% loss of rope strength or a distortion of rope structure, the entire rope may not require changing out, but instead only require a retermination.<sup>5</sup> T. 125.

Snyder was not aware that the operator reportedly conducted a daily examination of the hoist rope. T. 126-127. He agreed that approximately 350 feet of hoist rope was reterminated on August 7, 2018. T. 129. The rope itself was approximately 3,000 feet long. The rope (after the retermination) was not changed out in entirety. T. 130. Snyder had recommended wear blocks be installed to keep the hoist rope off the ground between the head shiv and the top of the slope. T. 131-132. Snyder was not aware of any criteria for determining whether a wear pad is worn out. T. 132. Nor was he aware of anything published by MSHA in reference to such. T. 132-133. The

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<sup>4</sup> The Transcript erroneously states the diameter reduction as 1.71 in one instance, where it should read 1.571. T. 110

<sup>5</sup> A retermination was described as when one takes a portion of the rope and installs a new portion to the existing rope with zinc oxide. T. 125.

wear pads protect the rope by allowing the rope to cut through them. T. 133. Until the rope cuts the pad in two, the rope remains off the ground and does not sustain additional abrasion which would accelerate its wear. T. 133.

When the slope rope is in actual operation, the tension in the rope would be different. T. 135. As the conveyance travels down the slope, the rope tension is going to increase by the weight of the rope that travels down the slope. T. 136.

Snyder disagreed that the life of a slope rope depended upon factors that included its frequency of use. T. 137. If the rope hoist is properly maintained, “it lasts longer.” T. 137.

Snyder was not present at Bailey Mine on August 13, 2018, when Vargo conducted the inspection that resulted in the issuance of the August 15, 2018 safeguard. T. 138.

When the hoist rope was reterminated, it was still in compliance but close to meeting the retirement criteria. T. 139. Both old and new ropes can develop kinks, especially when they are abused or mishandled. T. 139-140.

Snyder’s degree was in mine engineering, and he testified that he was neither a structural steel engineer nor a civil engineer. T. 141. Mine engineering did not specifically teach students about wire rope. T. 141.

Visual examination of a rope hoist can reveal clusters of broken wires, inadequate lubrication, deformation to the rope. T. 142. Snyder noted no reported hazards in the Respondent’s log book following the operator’s last 14-day examination on March 29, 2018. T. 142-143.

Snyder did not have the authority to issue citations. T. 143. The multiple areas of concern regarding the hoist rope motivated Snyder to advise the operator to remove a portion of the rope. T. 144.

In reference to the safeguard at Exhibit P-2, Snyder observed some of the same conditions on August 7, 2018. T. 144. Anything that adds friction to the rope—as it is observed dragging through rock, gravel, slate, and coal—is going to accelerate its wear. T. 145. Snyder did not believe that as the rope moves down the slope, more tension would be created on the wear pads or rollers. T. 146. The tension would be constant. T. 146. To perform the electromagnetic test, the rope would need to be in motion. T. 146.

Prior to his August 7, 2018 inspection Snyder clarified that the last 14-day test would not have been conducted as early as March. T. 147.

Snyder had visited Baily’s slope and other coal mine slopes in the past and had observed coal and rock going down the slopes. T. 147. He also agreed that the slope was exposed to outside elements, including rain and snow. T. 148.

## Craig Elson

Craig Elson worked for Consol Energy at the Crabapple Portal and had done so for approximately 18 years. T. 152. At the time of hearing, he worked as assistant master mechanic, overseeing underground and surface maintenance. T. 152.<sup>6</sup>

A slope hoist is used to haul material in and out of a coal mine. T. 155. In case of an elevator malfunction, a hoist can also be used to transport individuals. T. 156. The slope hoist at the Crabapple Portal is operated by a hoistman. T. 156. Different types of cars are loaded with supplies. T. 156. They will then be hoisted through the track switch, taken off the hoist car and delivered to where needed throughout the coal mine. T. 156. The hoist rope is attached to a brakeman car; supply cars are coupled to the brakeman car.<sup>7</sup> T. 156.

The total length of rope at the Crabapple Portal is 3,000 feet. T. 157. From the pit mouth to slope bottom is approximately 1600 feet to 1800 feet.<sup>8</sup> T. 157. The slope rope is attached to a drum; the drum winds or unwinds causing the supplies to be dropped or raised.<sup>9</sup> T. 157-158. All the cars, including brakeman car and supply car, are on a track. T. 157.

When Elson worked as a surface electrician, he would line up hoist rope tests, including non-destructive tests, 30-day tests, 60-day tests conducted by Frontier-Kemper. T. 158. He was also involved with any of the examinations involving the rope and hoist. He would address any breakdowns with the rope or car, drum room electrical issues, verbal frequency driver operation, and any communication problems from the top to the bottom of the slope. T. 158.

Sensors (called “tags”) are placed at the pit mouth and near the bottom of the slope and on top of the brakeman car so that the exact location of the car based upon a mathematical footage calculation can be determined. T. 158-159.

The hoist operator has a computer in front of him containing the location information. T. 159. There is another computer at the main hoist house containing the same information. T. 159.

Elson did not escort the inspector on the date the safeguard (P-2) was issued. T. 160. Kevin Wilson, now retired, had done so. T. 160. Elson was working on August 7, 2018, when the hoist rope was examined by MSHA tech support. T. 160. A caliper is used to determine whether there is diameter loss exceeding 6% of the baseline. T. 161. Not every rope is identical in diameter size, there being a few tenths of difference between various ropes. T. 162.

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<sup>6</sup> See TT 152-155 for other mining positions held and certifications received.

<sup>7</sup> A brakeman car is used to hoist individuals. T. 156.

<sup>8</sup> Pit mouth “is the opening in the earth where you go from surface to underground in the beginning of the tunnel on your 22 degree decline into the coal mine.” T. 157.

<sup>9</sup> The drum is also called a “drum room.” Tr. 157-158.

The hoist rope, when examined on August 7, 2018, was not beyond the retirement criteria. T. 163. MSHA did not issue any citations on August 7, 2018. T. 163. After the August 7, 2018 inspection Consol took out 350-foot of the rope that was approaching retirement criteria.<sup>10</sup> T. 163. The rope was earlier changed on December 14, 2017, and March 29, 2018. T. 163-165; *see also* R-1.

A non-destructive test was also performed in April 2018 by a subcontractor, Evergreen. T. 166; *see also* R-2. In conducting the NDTs, Evergreen utilizes a two-piece machine placed around the hoist rope. T. 167. The hoist car is run at a set speed; the rope is x-rayed twice, once down and once back. T. 167.

A review of Evergreen's certificates of inspection from April 23, 2016, through April 21, 2018, did not reveal that the Baily Crabapple slope rope had, at any point, met the retirement criteria. T. 168; R-2. The rope, however, was reterminated or changed between the non-destructive test dates. T. 168-169. Rope changes would be required in order to maintain three wraps on the drum: a 3,000 foot rope can be reterminated only so many times to stay within those specs to have the required number of wraps. T. 169. Some of the reasons for retermination or changing the ropes would be kinks, deformation and broken strands. T. 169.

In addition to the 6 month NTDs, Consol conducts a visual examination of the hoist rope every 14 days during which the hoistman inspects the entire length of the cable for any kind of deformation or broken strand. T. 169. The hoistman also visually examines the hoist rope every 24 hours. T. 170-171; *see also* R-3.

Additionally, there is a weekly permissibility examination performed, during which mechanics check all the safeties, connection points of the rope, anything electrical with the brakeman car itself, including brakes, lights, and batteries. T. 171-172; *see also* R-4.

During the examination of the slope car, "all the safeties" are checked. T. 172. The brakes are engaged to verify that they all set properly; batteries are checked for voltage; all lights and communications are checked. T. 172. The operator also checks for overspeed, mismatched speed, roll back.<sup>11</sup> T. 172; *see also* R-4.

Once a shift before the hoist is operated, a hoistman also conducts an examination. T. 173-174; *see also* R-5. He checks the car brakes, the connection point of the rope—"basically just making sure everything is in safe operating condition." T. 174.

If during the daily slope car checklist a deficiency is found, the car would be taken out of service and MSHA would be notified of such by the shift supervisor. T. 175.

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<sup>10</sup> Ketchum Construction, a subcontractor, actually performed the work. T. 163.

<sup>11</sup> For example, if the hoist rope would break, the car would go into overspeed. The brakes would be locked to the rail, avoiding a runaway car. T. 172-173.

Referring to Safeguard 9076448, wherein it was reported that the wear pad that the slope rope hoist rides on top of was worn down approximately 1 ¾", Elson noted that the wear pads at Bailey Mine were sometimes 2" thick and sometimes 2 ½" thick. T. 176. There are approximately 80 wear pads on the slope, which are designed to protect the rope. T. 176. Due to undulations in the mine floor, pads do not wear out at the same rate. T. 176-177. Rope tension also affected pad wear. T. 177. A fully loaded train with seven cars caused a higher tension on the rope than a brakeman car alone which could have sags in the rope. T. 177.

When a wear pad became worn through at Bailey Mine, it was either changed out or turned 90 degrees. T. 178. By turning the pads diagonally, double life could be gotten out of one pad. T. 178. Elson estimated that during his approximate six years as electrical supervisor on the surface, there were at least six occasions when the pads were turned or changed out. T. 178.

Elson discussed the two trough rollers, approximately 40 feet in by the slope track opening, that were reported to not be turning. *See also* Safeguard No. 9076448. There were seven trough rollers at the pit mouth, a couple outside the pit mouth and a few more in by the mouth. T. 178-179. The trough rollers were used to keep the rope over the knuckle. T. 179. The slope track was approximately 22 degrees. T. 179. The actual slope track on the surface before getting to the pit mouth opening was less. T. 179. During the transition over the crest, the trough rollers held the rope up off the surface, "concrete material or whatever." T. 179. Rollers are made of steel and are exposed to the weather. T. 179. They are subject to "wash back": water gets on the belt; coal is loaded onto the water; as it starts up the slope, the water will wash the coal backwards and make a "mess." T. 179-180.

Elson opined that the rollers at Crabapple Portal were not subject to the same wear or tension. T. 180. The third trough roller would take the most pressure or force. T. 181. On August 13, 2018, this roller was turning. T. 181. The two in by rollers, which were reported in the safeguard not to be turning, were numbers six and seven out of seven total rollers. T. 181.

The slope hoist rope does sometimes come into contact with gravel, rock, slate, mud, coal, and water—as reported in the safeguard. T. 181. While the operator does its best to prevent such contact, there is approximately 300 feet of cable exposed to the weather at all times. T. 181.

Elson disagreed with the assertion in the safeguard that the hoist rope had been removed from service "multiple times" for excessive wear. T. 181-182; *see also* P-2. On two occasions a non-destructive test was conducted. T. 182. Although the rope was below the retirement age, it was decided to change it out. T. 182. This was not done because of excessive wear; the majority of time it was "for kinks in the rope, distortion." T. 182.

In reference to Safeguard No. 9076449 noting various mine supplies on both sides of the tracks (P-4), Elson did not know of any material contacting the slope car as it dropped down. T. 182. Nobody normally walked the hoist slope. T. 182-183. If for whatever reason, one were to walk out of the mine, one would use the slope belt rather than the slope track because of the high velocity of air coming down the slope track—over 9,000 CFM. T. 183-184.

Elson disagreed that having mine supplies in the slope entry constituted a hazard. T. 184.

In reference to the wear pads depicted in the final photograph in P-5, Elson agreed that these pads were rectangular in shape and would have to be changed out—unlike the square wear pads on the slope. T. 185. Elson further agreed that a second rectangular wear pad depicted in the P-5 final photograph would require replacement. T. 186.

If wear pads are covered with material and the rope is dragging through the material the wear pad is not serving its purpose. T. 186; *see also* P-5. The examination reports in R-1 disclosed the need to replace the hoist rope before six months had elapsed. T. 188. A non-turning roller would add more frictional wear than a turning roller. T. 188-189.

There are three LED lights that face the track and route which, in combination with cap lights, aid visibility at night. T. 192-193. However, Elson conceded that the nighttime darkness on midnight shift would affect visibility. T. 190; *see also* R-3. The escalation reports, where problems were noted, all came during daylight hours rather than midnight hours. T. 191.

Elson did not possess a hoistman card or a hoistman certification nor had he ever physically worked on wire ropes. T. 189.

Usage of the slope rope would affect its life. T. 192. The rope changes reported in R-1 were between NDTs, establishing the operator was not only changing the rope when a NDT was performed. T. 192.

### Michael Tennant

Michael Tennant had worked for Respondent for approximately 20 years, being employed at Baily Mine for 18 years.<sup>12</sup> T. 194. Tennant had been working as a safety supervisor for Baily Mine in August 2018. T. 195.

Exhibit P-1 was a technical violation issued in response to a letter submitted to District Manager Russell Riley in connection with the safeguard issued on August 13, 2018. T. 196. Exhibit P-3 was a similar technical citation for a different safeguard issued on August 13, 2018. T. 197.

Tennant was aware that Inspector Vargo intended to inspect the Crabapple slope, hoist, and rope on August 13, 2018. T. 197. He discussed Vargo's issuance of the safeguards and conveyed his disagreement with such. T. 198.

Exhibit R-7 was a list of dates that Tennant reported to MSHA that Crabapple hoist had been down in 2016, 2017, and 2018. T. 200. Tennant had created the document to rebut the safeguard assertion that the Crabapple hoist had been taken down multiple times for wear on the

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<sup>12</sup> *See* TT 194-195 for full resume.

rope.<sup>13</sup> T. 200. On none of the dates reported in 2016 had the hoist been taken out of service for excessive wear. T. 201. On October 22, 2016, the operator did take the hoist out of service because it was “close enough to the non-destruct.” T. 201.

In reference to R-8 (Request for Health and Safety Conference), Tennant had requested conferences on the safeguards issued. T. 203.

As to Safeguard No. 9076448, Tennant disagreed that there was any specific hazard presented. T. 206. The slope hoist rope was “in fine shape.” T. 2016. Nobody’s life was in danger; no equipment was in danger. T. 207.

As to Safeguard No. 9076449 (P-4) Tennant again did not believe any specific hazard was presented by mine supplies on the side of the slope tracks. T. 207. He was unaware of any car coming into contact with any of the cited material. T. 207. There was already a safeguard at the mine that required 24 inches clearance. T. 207-209; *see also* R-10 Re slip and fall hazard.

As compared to track haulage, the slope car only went to the bottom area of the mine. T. 210. The slope car was moved by the hoist rope; track cars were pulled by a locomotive. T. 211; *see also* R-10, Safeguard No. 3670427.

Tennant contended that if the hazard presented was a “slip and trip” hazard, Safeguard No. 3670427 already addressed such. T. 212; R-10. If the hazard was derailment, there had been nothing observed by Vargo of materials coming into contact with the slope car. T. 212.

Supplies in the slope entry or on the slope itself did not present a hazard unless they came into contact with a car. T. 212-213.

## **CONTENTIONS OF THE PARTIES**

As to Safeguard No. 9076448 (P-2), the Secretary contends that the Respondent failed to address various unsafe conditions involving the slope hoist rope at the Crabapple Portal of Bailey Mine. These hazardous conditions included: multiple worn wear pads on the slope track; the hoist rope running into steel grating for approximately six feet; two trough rollers that would not turn when the hoist rope was in contact with them; the hoist rope being dragged through gravel, rock, slate, mud, coal, and water; excessive wear and damage to the hoist rope; the slope hoist rope’s removal from service multiple times for excessive wear.

As to Safeguard No. 9076449 (P-4), the Secretary contends that the Respondent improperly allowed the accumulation of debris and supplies on both sides of the slope track.

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<sup>13</sup> The full title of the document, which was partially obscured, read “reportable Crabapple Hoist Car.” T. 200. “Reportable” meant anytime the elevator was inoperable for more than 30 minutes in which case MSHA had to be notified. T. 200.

As to Safeguard No. 9076448, Respondent contends that the alleged transportation hazards associated with the Crabapple hoist rope were already covered by mandatory safety standards at 30 C.F.R. § 75.1430 through § 75.1438. As such, the safeguard was facially invalid because there was no actual mine specific transportation hazard not (already) covered by a mandatory safety standard. Respondent alternatively contends that, even if the safeguard was facially valid, there were no actual transportation hazards existent at any of the pertinent times within. The Respondent makes a similar argument with regards to Safeguard No. 9076449, arguing that it is invalid because there was no actual mine specific transportation hazard, and that the safeguard did not adequately articulate the hazard or the conduct required of the operator to remedy such hazard.

As to Safeguard No. 9076449, at hearing the Respondent contended that any alleged transportation hazard associated with the track was already covered by an existing mandatory safety standard (Safeguard No. 3670427) and that, in the alternative the Secretary failed to prove the existence of any actual transportation hazard associated with the slope track.

## ANALYSIS

- Issue I: Was Safeguard No. 9076448 facially invalid in that the contemplated transportation hazard—hoist slope rope failure due to excessive wear and tear—was already covered by existing mandatory safety standards at 30 C.F.R. §§ 75.1430 through 75.1438?
- Issue II: Assuming Safeguard No. 9076448 was not facially invalid, did the Secretary carry his burden of proving the existence of an actual transportation hazard?
- Issue III: Assuming the Secretary carried his burden of proof, did he properly articulate the conduct required of the operator to remedy the hazard?
- Issue IV: Was Safeguard No. 9076449 facially invalid in that the contemplated safety hazards associated with the slope hoist track were already covered by prior Safeguard No. 3670427?
- Issue V: Assuming Safeguard No. 9076449 was not facially invalid, did the Secretary carry his burden of proving the existence of any actual transportation hazard?
- Issue VI: Assuming the Secretary carried his burden of proof, did he properly articulate the conduct required of the operator to remedy the transportation hazard?
- I. Safeguard No. 9076448 was facially invalid in that the contemplated transportation hazard—hoist rope failure due to wear and tear—was already covered by mandatory safety standards found at 30 C.F.R. §§ 75.1430 through 75.1438.

At hearing and in his post hearing brief the Respondent contended that a safeguard may not be issued if there are already existing mandatory standards addressing the transportation hazard alleged. *See also* RB 7-11. *Cyprus Cumberland Resources Corp.*, 19 FMSHRC 1781, 1784– 85 (Nov. 1997), citing *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (January 1992)

(“*SOCCO II*”) (“In order to issue such a safeguard, an inspector must determine that there exists an actual transportation hazard not covered by a mandatory standard and that a safeguard is necessary to correct the hazardous condition.”).

The Secretary did not dispute this proposition at hearing. Inspector Vargo responded affirmatively when asked at hearing, “would you also agree with me that to issue a safeguard, the actual hazard with respect to the transportation of men and materials you determined to have existed must also not be covered by a mandatory standard?” T. 48. Rather, the Secretary cited to the applicable sections of the Act and regulations establishing MSHA’s authority to issue mine-specific safeguards to minimize hazards with respect to the transportation of men and materials and Commission case law in support of such. *See, inter alia*, SB 4-5, citing § 314 (b) of the Act, 30 C.F.R. § 75.1403 of the regulations, and the Commission holding at *Pocahontas Coal Co. LLC*, 38 FMSHRC 157, at 157 (Feb. 2016).

However, the general authority of MSHA inspectors to issue transportation safeguards on a mine-to-mine basis is not at issue.<sup>14</sup> Rather, Respondent has challenged Coal Mine Inspector Vargo’s issuance of this particular safeguard on the basis that mandatory safety standards in Part 75 of 30 C.F.R. already address the alleged transportation hazard posed at Baily Mine.

As to this threshold question, this Court finds that the existent safety standards in Part 75 of 30 C.F.R. §§ 75.1430 through 75.1438 do address the transportation hazard alleged to have existed at the operator’s Crabapple Portal.

This Court begins its analysis by considering what was the specific transportation hazard alleged.

The hazard as described in Safeguard No. 9076448 was “wear and damage (to) the hoist rope.” P-2, Section 8, Condition or Practice. At hearing, CLR Polka stated that the safeguard had been issued to protect miners from being exposed to the hazards of “the rope wearing out before it is expected and increasing the likelihood of an accident related to (the) rope failure.” T.8. Similarly, Inspector Vargo testified that his “main concern” in issuing the safeguard was damage and wear to the slope rope. T. 48.

At hearing there was much testimony directed toward various hoist slope conditions, including worn or missing wear pads, static trough rollers; the hoist rope’s exposure to the elements; the hoist rope’s contact with steel grating or concrete; and the hoist rope dragging through gravel, rock, slate, mud, coal, and water. *See* P-2, *see also* T. 17, 18, 20, 28, 33, 41, 70, 73, 74. Such conditions may or may not constitute hazards in and of themselves. However, clearly the ultimate transportation hazard contemplated in Safeguard No. 9076448 was *hoist rope failure due to excessive wear and tear*. Such hazard is already covered in the cited regulations under *Wire Ropes* in Title 30 of the regulations, §§ 75.1430 through 75.1438. Said sections

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<sup>14</sup> Likewise, the question is not, as Secretary seems to imply, whether a safeguard is invalid because it addresses hazards that exist at other mines. *See* SB 5, *Citing Oak Groves Res., LLC*, 35 FMSHRC at 2013.

address in detail when damaged or deteriorated wire hoist ropes should be repaired or replaced in order to avoid rope failure.

*Inter alia*, these sections specifically provide that “wire ropes...used to hoist” (§ 75.1430) shall be subject to “minimum rope strength” values (§ 75.1431), “initial measurement” (§ 75.1432), “examinations,” including biweekly visual examination and 6 month non-destructive testing (§ 75.1433), “retirement criteria,” including rope diameter reduction and rope strength loss percentages (§ 75.1434), “end attachment retermination,” (§ 75.1437) and “end attachment replacement” (§ 75.1438). These regulatory standards go to the heart of what constitutes excessive hoist rope wear and tear and render the within safeguard as duplicative and preemptive.

Considering, therefore, the record *in toto* and Respondent’s persuasive arguments on point, this Court finds Safeguard No. 9076448 to be facially invalid. The ALJ, however, recognizes that this a close question.<sup>15</sup> Accordingly this Court will further consider whether the Secretary carried his burden of proving that an actual transportation hazard existed when CMI Vargo issued the safeguard and whether MSHA had properly articulated the conduct required of the operator to remedy such hazard with specificity.

II. The Secretary failed to carry his burden of showing that an actual transportation hazard existed at the time in question.

As discussed *intra*, neither of Secretary’s witnesses had testified that any of the retirement criteria were met under § 75.1434 on the dates Snyder performed his non-destructive test nor the dates Vargo conducted his inspections or issued the safeguard. T. 51, T. 55, T. 85.

Vargo opined that an actual transportation hazard existed because the hoist rope was “right at the borderline.” T. 56. Similarly, Snyder testified the rope was “right at the limit.” T. 122. There is a speculative quality to these opinions which renders them problematic. According to Vargo’s and Snyder’s rationales, although the hoist rope was still compliant with all applicable wire rope regulations, a transportation hazard nonetheless presently existed because at some looming time the rope would become non-compliant and fail. Such reasoning implicates fundamental norms of due process. The reasoning also improperly imports the Commission’s assumption of continued mining operations in determining reasonable likelihood, to the analysis of whether a violation existed. *See Black Beauty Coal Co.*, 34 FMSHRC 1733, 1740 (Aug. 2012), *aff’d sub nom. Peabody Midwest Mining, LLC v. FMSHRC*, 762 F.3d 611 (7th Cir. 2014).<sup>16</sup>

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<sup>15</sup> Arguably, the MSHA inspector may have been properly exercising his statutory and regulatory authority under Section 314 (b) of the Act and Section 75.1403 of the regulations notwithstanding the Part 75 *Wire Ropes* standards discussed within. This is not an instance where the overreach of authority is manifested with refulgent clarity such as, for example, Martin Luther’s accusation of Pope Leo X’s usurpation of jurisdiction over Purgatory.

<sup>16</sup> The following analogy may not be on all fours. However, this Court wonders if the Secretary’s witnesses would accept—with equal equanimity—the finding of a Highway Patrol Officer that

In considering whether the Secretary carried its burden of proving an actual hoist rope transportation hazard existed, this Court has considered the weight to be accorded Vargo and Snyder's testimony. The Secretary cites Vargo's 30 years of mining experience and urges that "great weight" be given their testimony "due to their specific experience and training regarding the issues in this case..." SB 4.

This Court notes, however, that while Inspector Vargo had decades of experience in mining, he had little direct experience working on hoist slopes. On cross-examination, Vargo conceded he had never worked on slope hoists or with hoist ropes prior to joining MSHA in 2007. T. 45. He had no hoist-related certifications. T. 45-46. He had not performed actual work on slopes while at MSHA. T. 45. He had received "probably half a day" training on slopes at the Mine Academy. T. 46. He had never issued a safeguard prior to the issuance of the within safeguards. T. 47.

Vargo was unable to corroborate some of his testimony with his contemporaneous notes. T. 58-61; *see also* P-2. He had failed to take photographs on the date(s) of his observations, documenting such. T. 61. He also had failed to take actual measurements as to the depth of the grooves on the wear pads. T. 61. He was uncertain as to actual number of trough rollers that were located on the hoist. T. 72. Although he believed that the two inby rollers cited in the safeguard bore the most pressure, he had not inquired to confirm such. T. 72.

Inspector Vargo was also unable to determine how much—if any—contributory effect non-turning trough rollers would have on overall hoist rope erosion.<sup>17</sup> T. 72; P-2. He was unaware that Respondent had contracted wire rope specialists to perform work on the hoist rope days before he had issued the safeguard.

Inspector Snyder's mining engineering discipline did not involve any education in wire ropes. T. 141. Like Mr. Vargo, Michael Snyder had found no violations of the hoist rope on August 7, 2018. T. 51, 55, 110-120. He found the rope to be "right at the limit" but compliant. T. 122. He conceded that rope strength loss of 10% could be remedied by reterminating the affected section rather than changing out the entire rope. T. 125-126. He was unaware that the operator was also conducting daily examinations of the hoist rope. T. 127. He further agreed that, prior to the issuance of the safeguard, 350 feet of the hoist rope had been reterminated on August 7, 2018. T. 129-130. Snyder had not considered at the time the rope had been reterminated, whether it was safe to operate despite the worn wear pads.<sup>18</sup> T. 132.

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they were guilty of speeding because they were traveling at 64 miles per hour in a 65 MPH zone and would be presumably going over the speed limit shortly.

<sup>17</sup> As noted *infra* Elson maintained that the two non-turning trough rollers would not be bearing the most pressure exerted by the hoist rope—rather the third roller, which was turning, would.

<sup>18</sup> Though finding Snyder to be an honest individual, this Court also found Snyder to be purposely unresponsive to some of Respondent's counsel's questions.

On the other hand, Craig Elson, the operator's assistant master mechanic, had job experience with hoist operations. T. 157-158. He testified that the hoist rope had been reterminated on August 7, 2018, days prior to the August 15, 2018 issuance of the within safeguard. T. 163, 165. Elson further gave unrebutted testimony that, as long as there were three remaining wraps on a drum [see also § 75.1436 (b)], portions of the rope could be cut out, still allowing it to remain compliant and not thereby requiring the entire hoist rope to be replaced. T. 125-126. He also noted that there were daily visual examinations of the hoist, as well as the 14-day examinations. T. 170; *see also* R-3. Elson noted that wear pads wore out at different rates due to undulations in the floor. T. 177. He further testified that the third trough roller (which was turning during Vargo's inspections) would be sustaining the most pressure or force—not the two inby static trough rollers described by Mr. Vargo in the safeguard. T. 180-181. Unlike Vargo, Elson knew the exact number of trough rollers located on the slope hoist. T. 181.

As to Vargo's assertion in Safeguard No. 9076448 that the slope rope had been removed from service multiple times for excessive wear, Mr. Elson testified that this was inaccurate. T. 182. The majority of times that the rope was removed was for kinks or distortions—not wear or tear.<sup>19</sup> *See* R-7.

The Operator's safety supervisor, Michael Tennant, also disagreed with Vargo's characterization, submitting a written summary detailing the dates that the Crabapple hoist was reported "down" to MSHA. T. 199-201; R-7. The hoist had been reported down only two times in 2018, prior to Vargo's August 7, 2018 inspection, one of which was for car brake issues and one for kinks, neither time for wire rope wear and tear. R-7.

Neither of the Secretary's witnesses gave persuasive testimony as to the nature or rate of wear/tear to the hoist rope caused by the various alleged hazardous conditions that they described.

This Court concludes that the Respondent's witnesses knew as much as or more than Secretary's witnesses regarding the actual operation of the slope hoist and was ultimately left uncertain as to the accuracy of the Secretary's contentions that actual transportation hazards existed.

As trier-of-fact and trier-of-law, this Court was unable to find that the Secretary proved his case by the preponderance of the evidence.

III. The Secretary failed to articulate the hazard and conduct required of the operator to remedy the contemplated hoist rope hazard with specificity.

Even if the Secretary had carried his burden of establishing the existence of an actual transportation hazard, this Court is also persuaded by Respondent's argument that the Secretary failed to articulate the hazard and conduct required of the operator with specificity. *See* RB, pp. 14-16.

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<sup>19</sup> Kinks may be found in even new wire ropes. T. 80, 139.

At hearing, the Secretary's witnesses acknowledged that many of the conditions cited at the slope hoist—exposure to the elements, the presence of gravel, rock, slate, mud and water—were commonly found at mines throughout the country. T. 86.

This Court was not enlightened by Secretary's hearing presentation as to how such conditions could be specifically remedied.<sup>20</sup>

At hearing legitimate questions were also raised as to the effect of tension on the rope when the hoist was in operation and whether during operation the rope actually came into contact with debris. *See, inter alia*, T. 132-135.

CMI Vargo noted in his safeguard that "all wear pads that the hoist rope travels over be properly maintained." P-2. However, Vargo gave vague and inconsistent testimony as to what constituted "proper maintenance" T. 62-64, T. 91.<sup>21</sup> MSHA has not published any specific guidelines as to wear pad maintenance or replacement. T. 64, T. 132-133.

At hearing and in the safeguard, Vargo had noted that a wear pad had been worn down approximately 1 ¾ inches. P-2. This was an estimate as Vargo had failed to take actual measurements of the groove or, indeed, the actual thickness of the wear pad in question. At hearing it was indicated that wear pads wore out at different rates, that wear pads were of different shapes, including square and rectangular shapes, and that they were of varying thickness. *See, inter alia*, T. 176-178. Given all these variables this Court concludes that the operator was given insufficient notice as to when a particular pad or group of pads actually needed to be replaced.

This Court does not have the authority or inclination to dictate what specific guidelines should have been placed in MSHA's safeguard regulating hoist ropes at Baily Mine. However this Court suggests that the remedies for repair or replacement of such items as wear pads or trough rollers should have some specificity. For example, a wear pad measuring 2 ½ inches in thickness should be replaced or rearranged when it is worn down to ¼ inch thickness.<sup>22</sup> Similarly, notice of specific criteria as to when the number and position of static rollers pose a transportation hazard should be afforded to the mine operator.<sup>23</sup> As to the condition of hoist rope removal from service "multiple times," the ALJ suggests that a specific number of times within a specific time period for a specific cause be clearly set forth in the safeguard.

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<sup>20</sup> *See also* Respondent's arguments on point at RB, pp. 15-16.

<sup>21</sup> In its brief the Respondent persuasively reviewed Vargo's contradictory testimony. RB, at pp. 15-17.

<sup>22</sup> At hearing Secretary's witness, Mr. Snyder, implied that a wear pad could serve its function until it was actually cut in half. T. 132-133.

<sup>23</sup> In his brief Respondent persuasively argues that neither the safeguard nor Mr. Vargo detailed what it meant for rollers to be "properly maintained" or to "turn freely" or how operator was to achieve the mandate. RB, p. 16.

In summary this Court further finds that the safeguard was fatally deficient in articulating the hazard and conduct of the operator to remedy such hazard with specificity. For the foregoing reasons, Safeguard No. 9076448 violation should be vacated.

IV. Safeguard No. 9076449 does not address transportation hazards covered by a previous safeguard issued at Baily Mine.

Unlike Safeguard No. 9076448, this Court concludes that Safeguard No. 9076449 is facially valid in that the specific transportation hazards which Inspector Vargo sought to prevent were not already covered by an existing mandatory safety standard.

In reaching the within conclusion, this Court was persuaded by the arguments raised in Secretary's brief as to the differing hazards contemplated in Safeguard Nos. 3070427 and 9076449. *See also* SB, 8-10.

Respondent has contended that Safeguard No. 3670427, issued at Baily Mine in March 2001, already addressed the safety hazards contemplated in the MSHA inspector Safeguard No. 9076449, issued in August 2018. T. 210-211.

This Court does not agree. The Secretary's arguments against such preemption are persuasive. *See also* SB, 8-10.

At hearing Baily Mine's safety supervisor, Michael Tennant, agreed that Safeguard No. 3670427 dealt specifically with track haulage. T. 210. On cross-examination, he conceded that the safeguard did not address such hazards as hoist car derailment.

Considering also that Safeguard No. 9076449 dealt with a different area of the mine, the slope hoist area, as opposed to track haulage areas, that track cars are moved by locomotives and slope cars by a hoist rope, and given the different transportation described *infra*, this Court finds Safeguard No. 9076449 to be facially valid.

V. The Secretary failed to carry its burden of proving that an actual transportation hazard contemplated in Safeguard No. 9076449 existed at the time of MSHA's inspection(s).

Safeguard No. 9076449 indicated that various mining supplies and discarded items were seen on both sides of the slope tracks. P-4, Section 8. The Secretary contends that these conditions created various hazards. *See also* SB, 9-10. There would be a slip and trip hazard presented to miners traveling on foot such as examiners, track cleaners, and miners using the track slope as an emergency route. T. 38-39, 44, 183. Debris could fall into the hoist car's brake clamps and track, preventing the cars from stopping, creating a struck-by hazard for miners in the hoist cars, including examiners and miners working in the slope track or working at the bottom of the slope track. T. 40-41. There being no seat belts, miners might be thrown out of the hoist cars. T. 39. Debris could come into contact with the rail and the hoist car wheels and could cause a derailment. T. 39-43. The hoist rope could abrade against debris in the slope track and create additional excessive wear. T. 39-41. A struck-by hazard would be created for miners working in or at the base of the slope track or for miners riding in hoist cars. T. 30-41.

At hearing, however, Mr. Vargo offered little evidence that the supplies and debris described in the safeguard were actually in contact with the slope track, brakes or slope cars, or slope hoist.<sup>24</sup> On cross-examination, Vargo admitted that he did not know whether any material was actually contacting the slope car. T. 87.

As to many of the alleged hazards, Vargo offered little in the way of corroborative support. He had failed to take measurements to determine how close material was to the track. T. 87. While testifying that there was material in some areas contacting the slope rope, no such observations were recorded in the safeguard or his contemporaneous notes. T. 87; *see also* P-4.

Similarly, as to whether material presented a slip and trip hazard, Vargo again failed to note such in the safeguard or his notes.<sup>25</sup> T. 88. This led to Vargo having to split hairs in his testimony. His explanation that he hadn't said "slipped" or "tripped", but only that he slipped was somewhat confusing. T. 89. This Court found it an open question as to whether Vargo and his escort had slipped because of the steepness of grade or because of material in the space between the track and supplies. Given that it is Secretary's burden to establish each operative fact, this Court specifically finds that the Secretary failed to carry such burden as to the existence of an actual slip and trip or slip and fall hazard.

This Court finds the Respondent's arguments as to the absence of actual transportation hazards to be persuasive and holds that it is correct. *See also* SB at 17-18.

VI. Assuming the Secretary did carry his burden of proof, the Secretary failed to properly articulate the conduct required of the operator to remedy the contemplated transportation hazards.

This Court agrees with Respondent's argument that Safeguard No. 9076449 is invalid because it contains vague and non-specific remedies that do not adequately address or provide adequate notice of the conditions and how the operator is to remedy the contemplated transportation hazard. *See* RB, p. 18.

The safeguard directs that the slope track be "kept free of these mine supplies and other supplies that are hoisted in and out of the mine." T. 93; P-4. Given that supplies are hoisted in and out of the mine, the safeguard provides insufficient direction as to how the slope track should be kept free of such. Considering Vargo's testimony that supplies or materials located in the slope which do not contact the slope car are not hazardous, the safeguard provides insufficient notice as to what remedies should be undertaken to avoid the contemplated transportation hazards.<sup>26</sup>

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<sup>24</sup> The issue of slope rope damage has already been discussed above.

<sup>25</sup> This Court also notes there may be an issue as to whether a slip and fall hazard constitutes a hazard with respect to transportation under § 75.1403.

<sup>26</sup> For example should there be a certain clearance distance maintained between the haulage track and any supplies, materials, debris along the track?

For the foregoing reasons, Safeguard No. 9076449 violation should be vacated.

**ORDER**

It is the **ORDER** of this Court that Citation Nos. 9076455 and 9076456 and respective associated Safeguard Nos. 9076448 and 9076449 are hereby **VACATED** and **DISMISSED**.



John Kent Lewis  
Administrative Law Judge

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